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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Perhaps the most disappointing feature of the government's Memorandum (hereinafter cited as "Memo") is its attempt to oversimplify the prolix factual and legal issues involved in this case. In order to achieve this goal, it has been necessary for the government to misstate certain facts, rely on proof specifically rejected by the Court of Appeals to show undue influence, ignore the Confrontation Clause, and, ultimately, take refuge in the harmless error doctrine.

For clarity, we enumerate certain of those matters in the Memo which cause these concerns.

1. Apparently in order to magnify the extent and effect of Petitioner's alleged telephone conversation with Swibel (see Petition, pp. 8-9; T. 494-6; Pet.App., p. 10), the government states that Swibel, in addition to being Chairman of the Chicago Housing Authority (C.H.A.), was also Chairman of the Chicago Dwelling Association (C.D.A.). (Memo, p. 5) Swibel was not Chairman of the C.D.A. Nor did he hold any position in the C.D.A.'s executive or operating hierarchy. The only "evidence" that Swibel exercised any influence with respect to C.D.A. purchases was the Broderick letter, whose competency for the purpose of that showing is challenged on constitutional and evidentiary grounds. (See, *infra*, pp. 2-4; see Petition, pp. 16-23) Absent the Broderick letter's hearsay assertions, there was no evidence that Swibel influenced C.D.A.'s purchase of 5 Alpine lots, or that any lots were purchased as a result of Keane's calling Swibel. (See *infra*, p. 5)

2. The constitutional problems arising from the use of the Broderick letter have been largely ignored by the government. Thus, the letter is treated merely as an item of evidence, admissible under the business records exception to the hearsay rule,[1] but without regard for the ultimate purpose to which the letter was put. (Memo, pp. 7-8) This purpose—to show by Broderick's written, unsworn

[1] During trial, the government made a blanket offer into evidence of a number of files and documents as business records. As stated by the government (Memo., p. 7), trial counsel for Petitioner agreed that the documents were authentic and were business records. However, when the Broderick letter was individually brought forward to be proved up, specific objection was made that it contained hearsay statements not admissible under the business records exception to the hearsay rule. (T. 1460-61) Moreover, the trial judge specifically recognized that many hearsay statements were contained in the letter, but allowed that, "if they are relevant, they may be admitted." (T. 1464)

word, that Swibel had issued a directive to Bach, as allegedly reported by Bach to Broderick—violated the Confrontation Clause, which, as we have shown (Petition, pp. 16-23), cannot be equated with the hearsay rule.

Qualification of a document as a business record does not, of itself, dispense with the Confrontation Clause and permit admission into evidence for purposes clearly forbidden by that Clause and its underlying rationale. The interrelationship of the business records exception and the Confrontation Clause—the effect which one must necessarily have upon the other—requires a definition by the Court which the government, apparently, seeks to avoid.

In placing the hearsay rule in absolute congruency with the Confrontation Clause, the government takes refuge in the harmless error doctrine. (Memo, p. 8) In so doing, the government ignores the trial prosecutor's consistent assertion to the jury that Keane, a man with "clout", applied "pressure" and "pulls the strings." (Petition, p. 11)

The "undue influence" charge permeated the entire trial. It was used to taint all of the evidence. Indeed, the Broderick letter was blown up for use in closing argument and, of all the many documents admitted, stood alone before the jury on an easel while the government berated Keane's "influence" and "breach of public trust." As was stated by the Court in *Kotteakos* v. *United States*:

> "• • • [T]he question is, not were they [the jury] right in their judgments, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> • • •

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (328 U.S. 750, 764-5 [1945]; citations and footnote omitted.)

In the instant case, there was a departure from the constitutional norm—the Confrontation Clause was violated. Moreover, the Broderick letter was deliberately employed by the government in such a manner as to have maximum impact in swaying the jury. In such circumstances, regardless of what other evidence might exist to support the verdict, the Broderick letter was clearly intended to have substantial influence upon the jury.

There was yet a further vice in the use of the Broderick letter. The government, in arguing to the jury, cast serious reflection upon Swibel's character (T. 3373), despite its pretrial statement indicating that Swibel was not a co-conspirator. Yet, the government has refused to make available either Swibel's or Bach's grand jury testimony. Thus, no one has been able to test the government's claims concerning Swibel, or the truth of the matters asserted in the Broderick letter. (See Petition, 22-23)

3. The government claims for the first time here that C.H.A.'s purchase of 60 Alpine lots was related to and ultimately influenced by Petitioner's alleged telephone call to Swibel, the Chairman of C.H.A. (Memo, p. 8) Making

this claim at this juncture enables the government to argue now that the Broderick letter was cumulative. This should be compared to the government's position in both courts below, *where it was never claimed that undue influence was exerted in the C.H.A. transactions.* And the Court of Appeals did not find that undue influence was used in these transactions. (Pet. App. pp. 29-30) Thus, the premise for the government's cumulative argument is clearly without support in the Record.

The undisputed evidence regarding the C.H.A. transactions showed that Hennessey, Jr., independent of his father and Petitioner, learned that other scavenger sale purchasers were selling lots to C.H.A. (T. 1222, 2528-29) Because Alpine owned property in the area in which C.H.A. was buying from other scavenger sale purchasers, Hennessey, Jr. set out to join the parade. (T. 1223)

Junior negotiated exclusively with Charles Intrieri, a C.H.A. attorney. (T. 498, 772, 2529-30) Intrieri was not told that either Keane or Schwartz had an interest in the property. (T. 1160, 1223) Over a period of one to two years, Jr. negotiated with Intrieri 59 individual sales to C.H.A. In determining price, C.H.A. used only its own appraisals. Take-it-or-leave-it offers, sometimes below appraisal, were then made. (T. 1715, 772) Although Jr. regularly sought to obtain higher prices, he was unsuccessful on all but one occasion—when he received $100 more than was offered. (T. 2531-34)

At no time has the government contended that the price or terms of any C.H.A. purchase were unfair or excessive. Indeed, the lack of substantial evidence showing undue influence by Petitioner in sales to C.H.A., is underscored by the failure of the court below to discuss the issue. (See Pet.App., pp. 29-30)

4. The government refers to sales of properties to the Metropolitan Sanitary District[2] (M.S.D.) as though these sales were further indicative of fraud.[3] (Memo, p. 6) Property acquired by the M.S.D. from Alpine was at a price below M.S.D.'s own appraisal. (G.X. 17-1) In fact, the Seventh Circuit specifically found that the "evidence was insufficient to justify the conclusion that undue influence was used by" Petitioner in the M.S.D. acquisition of Alpine properties. (Pet.App., p. 30, footnote 29)

5. Attempting to sustain the finding below that Petitioner used "inside information," the government quotes the opinion of the Court of Appeals "that it was not until August 21, 1966 (after the scavenger sale), that an announcement was made to the public that the area [87th and Mackinaw] had definitely been designated to undergo study to see if it qualified for urban renewal." (Memo, p. 10)

On August 21, 1966, newspaper articles did report that a request was made for federal funds for a study to determine whether the area would qualify as an urban renewal project. (Tr. 1593-94) However, the appearance of this story cannot detract from the *undisputed* further evidence that, on November 28, 1965, (prior to the scavenger sale) the newspapers reported a press release by the Department of Urban Renewal:

> "A thirty-five block area on the southwest side known as Millgate, [the predecessor designation for the 87th and Mackinaw area] sometimes called one of the city's most rapidly deteriorating areas, soon will be studied for redevelopment by the Department of Urban Renewal." (T. 1604-05)

[2] M.S.D. is an independent Municipal corporation established by statute. Ill.Rev.Stat., 1975, Ch. 42. It is not an agency, nor does it use funds, of the City of Chicago. (T. 2347)

[3] However, at the conclusion of its case, the government dismissed, on its own motion, the substantive mail fraud charge based on a M.S.D. mailing.

This media report was followed by additional newspaper articles concerning meetings between representatives of the Department of Urban Renewal and community leaders to determine the nature of the urban renewal. (See, e.g., G. Ex. 16-11)

When Keane, in April 1966, told Hennessey to buy in the area, it was thus common knowledge, having been reported through the media, that the area was being studied for redevelopment. Small wonder the Seventh Circuit was led to conclude that the evidence concerning advance information was "not overwhelming." (Pet. App. p. 18) And yet, the confusion of the Seventh Circuit is even more evident when the paragraph immediately following those quoted in the Memo, (p. 10) is considered:

> "Although the evidence is not overwhelming on the use of advance information charge, and it is possible to interpret the evidence as representing shrewd business judgment on Keane's part, we cannot say that the jury was not entitled to believe that Keane made use of advance information to acquire substantial amounts of property in an area *prior to the public announcement indicating that the area was being considered for urban renewal.*" (Pet. App., p. 18; emphasis added)

The evidence showed exactly the opposite of what the Court of Appeals said it showed. The public announcement that the area was being considered for urban renewal came six months before the alleged Hennessey-Keane conversation as to what property to purchase. There was no evidence from any source that Keane had obtained any other advance information.

This is not the only instance of confusion existing between the evidence in the record and the opinion. (See, e.g., Petition, p. 8, fn. 5)

CONCLUSION

For the foregoing reasons, in addition to those heretofore recited in the Petition for Writ of Certiorari and the Supplement thereto, Petitioner respectfully requests that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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